00-246

Record No. _____

Supreme Court, U.S.
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In The Supreme Court of the United States

CHERYL COHEN, on behalf of herself and others similarly situated,

Petitioner,

v.

OFFICE DEPOT, INC., a Florida Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF PURSUANT TO RULE 15

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Petitioner, Cheryl Cohen ("Cohen") files this Reply Brief, pursuant to Rule 15 of the United States Supreme Court Rules.

STATEMENT OF THE CASE

Office Depot's statement of the case seeks to minimize the lawsuit filed by Cohen by ignoring and mischaracterizing the allegations of Cohen's Complaint. Office Depot focuses attention on the "155% Low Price Guarantee," which allows a customer to receive an item advertised for less elsewhere for the advertised lower price, plus 55% of the difference. Response Brief at 1. Office Depot asserts that Cohen filed a lawsuit claiming the 155% guarantee instead of requesting it from Office Depot. This ignores the fact that the Complaint contains at least eight (8) false or misleading statements in Office Depot's catalogs, which formed the basis for Cohen's seven (7) claims in the Complaint, of which the155% guarantee claim was only one, i.e., Count V.[1] R1-1.

Office Depot's approach in picking out one of the misrepresentations and defending it does not address the claims in the Complaint. In fact, it is well settled law that in making a determination regarding unfair and deceptive acts that mislead consumers, a Court looks to the overall impression conveyed by the advertisement, and not the impact of isolated words and phrases. See Murray Space Shoe Corp. v. F.T.C., 304 F.2d 270 (2d Cir. 1962); Beneficial Corp. v. F.T.C., 542 F.2d 611 (3d Cir. 1976); American Home Products Corp. v.

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[1] In particular, Office Depot fails to address Cohen's allegations regarding unlawful and hidden charges for delivery, although catalogs tell consumers that deliveries of merchandise are free. Such hidden charges are in direct violation of Federal Trade Commission regulations. See, 16 CFR, Section 251.1.

F.T.C., 695 F.2d 681 (3d Cir. 1982); F.T.C. v. Pharmtec Research, Inc., 576 F. Supp. 294 (D.C. Cir. 1983).

In addition, Office Depot suggests, without support, that Cohen's request for punitive damages, which were provided for under Florida law, was improperly made as it rested on comments from an Office Depot spokesperson who did not make "corporate admissions." Response Brief at 3. This argument fails to address the fact that Cohen's request for punitive damages rested only in part on the spokesperson's comments to The Miami Herald. Moreover, neither the District Court nor the Eleventh Circuit Court of Appeals in its two published opinions have questioned the basis for Cohen's request for punitive damages. In fact, as the district court stated, "But for the requirements imposed by Section 768.72, Cohen's $10,000,000 punitive damages claim appears to satisfy the amount in controversy ... In Florida punitive damages are imposed ... to punish the defendant for extreme wrongdoing and to deter others from ... similar conduct." (App. E, 55a).[2]

Finally, Office Depot's Statement of the Case contains new issues that require a response. Office Depot's contention that Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000) ("Cohen II") did not address the substantive merits of Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978) or Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996) and only stands for the proposition that the prior precedent rule must be followed is wrong, as discussed below.

In fact, Cohen II necessarily did more than assert the prior panel precedent rule, it changed the law of the Eleventh

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[2] References to "App." are to the Appendix filed as part of Cohen's Petition for Writ of Certiorari.

Circuit, which had been established since 1996 on the issue of aggregation of punitive damages. Moreover, Office Depot's characterization of Cohen II as not establishing the law in the Eleventh Circuit on the issue of aggregation is not supported by the Eleventh Circuit's own recent citation to Cohen II.

In Morrison v. Allstate Indemnity Co., 2000 WL 1392456 (11th Cir. Sept. 26, 2000) the Court, without citing to Lindsey, asserted that Cohen II stood for the proposition that punitive damages must be divided equally among class members. Thus, the Eleventh Circuit appears to be in disagreement with Office Depot's position regarding the meaning and effect of the Cohen II decision.

In addition, Office Depot's continual reference to Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) as not being in conflict with Cohen II because it was decided within the same circuit as Lindsey and Cohen II simply is wrong, as discussed below, based on a review of the opinions.

REASONS FOR GRANTING THE WRIT

A. The Conflict Between Allen and Cohen II Is Not Intra Circuit and Even Assuming It Were, Certiorari Is Proper

Office Depot argues at length that certiorari would be improper because any conflict between Allen and Cohen II is intra circuit not inter circuit, as Lindsey was the controlling precedent for both decisions. Response Brief at 6-7; 11.

Quite simply, this position fails to consider the clear language of Allen, which held that whether punitive damages claims represented a common and undivided interest "[i]s a question of first impression on the appellate level in this circuit." Allen, 63 F.3d at 1332. The Allen Court so

determined even though it was aware of Lindsey and cited to it in a footnote. Id. at 1331. Nevertheless, the Allen Court determined that Lindsey was not binding on it and decided that punitive damages could be aggregated based on a review of the state law at issue, i.e., Mississippi. Thus, according to Allen, Lindsey was not implicated in or precedent for the decision whether punitive damages could be aggregated as a common and undivided interest under existing Supreme Court precedent, notwithstanding Office Depot's assertions to the contrary.[3]

In contrast, the Cohen II Court determined that Lindsey was precedent on the issue of aggregation of punitive damages and, on this basis, changed the law in the Eleventh Circuit. Tapscott. Such a ruling created a conflict with Allen, which had not previously existed. It is important to keep in mind that Tapscott also cited to Lindsey and, like the Allen Court, determined that the issue of aggregation under a common and undivided interest analysis was one of first impression in the Eleventh Circuit. 77 F.3d at 1357.

Therefore, while Office Depot seeks to create an intra circuit conflict by arguing that Lindsey governed the decisions in Allen and Cohen II, it is clear that the Allen Court's opinion does not support this argument and that, as a result, the Cohen II decision, which established that "the amount of punitive

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[3] Office Depot cites to Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596 (5th Cir. 1998) as a subsequent Fifth Circuit decision that "confirmed" the viability of Lindsey and the limitation of Allen in the Fifth Circuit. While Ard did cite to Lindsey as prior law on aggregation, it involved a different panel than Allen, and failed to acknowledge that Allen did not view Lindsey as precedent. Moreover, Ard did not limit Allen, but noted under Louisiana law, it did not reach the same conclusion regarding aggregation. 138 F.3d at 601.

damages must be divided equally among all of the class members ..." Morrison, 2000 WL 1392456 * 7, resulted in an inter-circuit conflict for which certiorari review is proper.

Even assuming that Lindsey was binding precedent for Allen and Cohen II, contrary to the Allen Court's conclusion, any resulting intra circuit conflict does not preclude certiorari review. Accordingly, in Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 70 S. Ct. 322 (1950) this Court granted certiorari based on an intra circuit conflict in the Second Circuit regarding the finality of a judgment for purposes of appeal. Importantly, in Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518 (1999), while acknowledging that the decision of the Court of Appeals was consistent with other federal courts that had addressed the issue before it, this Court granted certiorari because of the importance of the issues in the case.

B. There is a Conflict Between Cohen II and Allen

Office Depot asserts that because Allen did not deal with a class action claim, but, instead involved 512 plaintiffs seeking punitive damages, it is factually distinguishable from Cohen II and no conflict between the two decisions exists. Such a contention results from a failure to properly review the arguments contained in Cohen's Petition and failure to review the language of the two opinions.

The first question presented in Cohen's petition concerned whether Cohen II's finding that punitive damages may not be aggregated in a class action was in conflict with Allen and not in conformance with Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969) and Zahn v. Int'l Paper Co., 414 U.S. 291, 94 S. Ct. 505 (1973). Office Depot focuses only on the words "class action" because Allen was not a class action case. However, this argument misses the point that the issue

presented for review in the Petition does not rest upon the "class action" status of Allen.

In fact, Office Depot fails to address the fact that the issue for this Court's review rests on the analysis of the legal principles of common and undivided interests for aggregation of punitive damages and whether plaintiffs united in a lawsuit who claim such damages may aggregate them for jurisdictional purposes. Because Cohen II and Allen reached entirely different determinations on this issue, which determinations may not be in conformity with Snyder and Zahn, they are in clear conflict. Office Depot's citation to Wisconsin Electric Co. v. The Dunmore Co., 282 U.S. 813, 51 S. Ct. 214 (1931), a one sentence per curiam dismissal of certiorari, for the proposition that certiorari is not proper when a conflict in decisions arises from facts and not principles of law, is misplaced and unavailing. It is only by an improper reading of Cohen's issue presented for review that Office Depot maintains that the conflict between Cohen II and Allen is factual and not legal.

Moreover, Office Depot's alternative assertion that Ard resolved any purported conflict between Cohen II and Allen in the Fifth Circuit Court of Appeals is unpersuasive. As noted above, the Court in Ard found that Lindsey was precedent as to its determination regarding aggregation of punitive damages. Ard, 138 F.3d at 600. However, the Ard Court failed to acknowledge that Allen specifically determined Lindsey was not precedent and decided the issue of aggregation of punitive damages based on a common and undivided interest analysis as an issue of first impression. Allen, 63 F. 3d at 1331.

Further, Office Depot's contention that Allen, Cohen II and Lindsey are all in agreement in applying state law and thus, are not in conflict on the issue of aggregation, is confusing and misplaced. Simply stated, Lindsey did not analyze the issue of

common and undivided interests under state law for aggregating punitive damages, but summarily held against aggregation. 576 F.2d at 595.[4] Allen analyzed the issue of common and undivided interests under state law and held in favor of aggregation. 63 F.3d at 1332. Cohen II effectively reversed the law of the Eleventh Circuit, which was established by Tapscott, and which was consistent with Allen on the issue of aggregation. Where's the consistency?

C. Cohen II is an Affirmance of Lindsey and Establishes the Law of the Eleventh Circuit

Equally confusing is Office Depot's assertion that Cohen II is not an affirmance of Lindsey. Office Depot argues that Cohen II only concluded that it was bound by the earliest

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[4]Office Depot's argument that Lindsey properly followed Snyder and Zahn again is based on an improper reading of the decision. Office Depot asserts that because Lindsey quoted from Zahn on the general proposition regarding non-aggregation, that this meant that the Court did, in fact, follow Snyder and Zahn. However, this argument fails to acknowledge that Lindsey did nothing more than cite to these two cases, without analysis. In fact, the Cohen II court in affirming Lindsey and reversing Tapscott had to read a great deal into the Lindsey decision. For example, the Cohen II court stated, "a necessary part of Lindsey's reasoning is the holding that for amount in controversy purposes a class punitive damages claim must be allocated pro rata ..." 204 F.3d at 1073. Similarly, the Cohen II Court noted, "Thus, Lindsey inescapably stands for the proposition that a federal court cannot exercise diversity jurisdiction over a class ..." Id. at 1075. Likewise, the Cohen II Court stated, "Thus, while our opinion in Lindsey does not explicitly forbid the aggregation of a class claim for punitive damages ..." Id. at 1075.

circuit decision and did not substantively review Lindsey or the issue of aggregation. However, Office Depot fails to address, at all, the fact that Cohen II reversed the law of the Eleventh Circuit since 1996 on the issue of aggregation of punitive damages. Moreover, contrary to Office Depot's position, the Eleventh Circuit in Morrison, cited to Cohen II as establishing that

> "[I]nstead of being aggregated ... the amount of punitive damages must be divided equally among all of the class members to determine the proper amount in controversy for each member.

2000 WL 1392456 * 7 (citation omitted). Accordingly, it is clear that Cohen II created a conflict with the Fifth Circuit's decision in Allen, which conflict did not exist prior to the Cohen II decision.

D. The Fifth Circuit's Free Decision Is in Conflict With Zahn

Office Depot maintains that the Free v. Abbott Laboratories, Inc., 51 F.3d 524 (5th Cir. 1995), aff'd 120 S. Ct. 1578 (2000) decision is not in conflict with Zahn because this Court affirmed Free in a per curiam decision. Cohen did not assert that this Court's affirmance of Free was precedent. Rather, the fact is that the law in the Fifth Circuit on the issue of supplemental jurisdiction and the viability of Zahn is uncertain and in conflict with Cohen II's determination that Zahn provides the basis for non-aggregation and for requiring plaintiffs to each satisfy jurisdictional requirements.

E. Cohen May Raise Equal Protection Arguments

Office Depot contends that Cohen's equal protection argument may not be brought before this Court for lack of

standing and because there is a rational basis for Cohen II's application of Section 1332.

First, Cohen's constitutional challenge is properly raised. As this Court noted in Pennel v. City of San Jose, 485 U.S. 1, 6, 108 S. Ct. 849, 854 (1988) "application of the constitutional standing requirement [is not] a mechanical exercise ... a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," which is the case here. Thus, notwithstanding Cohen's argument on behalf of defendants' equal protection guarantees, as affected by the application of Cohen II, Cohen, herself, has been directly injured.

Further, Cohen's arguments regarding equal protection go to the consistent theme of her arguments on appeal regarding Cohen II and the impropriety of disallowing aggregation of punitive damages to satisfy the amount in controversy requirement. Further, there was no basis for Cohen to raise an equal protection challenge until after the Cohen II decision, since prior to that time, Tapscott was the law of the Eleventh Circuit on the issue of aggregation of damages and evaluated punitive damage claims on the basis of a common and undivided interest, not from the viewpoint of one plaintiff.

Moreover, the Amicus Brief filed in support of Cohen's Petition for Rehearing raised equal protection arguments. Thus, the equal protection arguments were, in fact, brought before the Court, but were not resolved based on the denial of the petition for rehearing. Even assuming the argument had not been raised, in Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 377, 115 S. Ct. 961, 964 (1995) this Court noted that it was not until after it granted certiorari that Appellant first "[e]xplicitly presented – in his brief on the merits – the alternative arguments [that Amtrak was a federal entity."] This Court

determined that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Id. See also Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468 (1980) (Court is not precluded from deciding issues not presented below if issue is squarely presented, is fully briefed and is important); Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 111 S. Ct. 2749 (1990) (It suffices that the court below passed on the issue presented, particularly where the issue is in a state of evolving definition and is one of importance to the administration of federal law).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Cohen's Petition, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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